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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 829

SANFORD ZWICKLER,

Appellant,

against

AARON E. KOOTA, as District Attorney of the County of Kings,

Appellee.

ON APPEAL TO THE UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF NEW YORK

MOTION TO DISMISS OR AFFIRM

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ON APPEAL TO THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK.

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Appellee Aaron E. Koota, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves to dismiss on the ground that the appeal is not within the jurisdiction of this Court, or in the alternative, to affirm on the ground that the questions presented are so insubstantial as not to warrant further argument.

Statement

This is a direct appeal from an order of a statutory three-judge Court, entered in the United States District Court for the Eastern District of New York on September 29, 1966

(Statement as to Jurisdiction, Appendix A), which denied appellant's application for a preliminary injunction and granted appellee's motion to dismiss the complaint.

The appellant brought this action for a declaratory judgment and an injunction to enjoin the appellee, as District Attorney of Kings County, from prosecuting him under New York Penal Law § 781-b which probihits, *inter alia,* the distribution of anonymous political literature in quantity.* The amended complaint challenges the constitutionality of Penal Law § 781-b on the ground that "it infringes upon the rights of the plaintiff under the First and Fourteenth Amendments to the Constitution of the United States."

Although alleging that he "desires and intends to distribute" anonymous political leaflets in Brooklyn with regard to the election campaign of 1966 (Amend. Compl., par. 14), appellant fails to allege either in the amended complaint or in any papers submitted to the Court below that he actually distributed anonymous political literature in 1966 or that he was being prosecuted for any such distribution. Rather, appellant bases his amended complaint upon the fact that he was previously charged with a violation of Penal Law § 781-b for distributing an anonymous political leaflet during a 1964 congressional campaign and found guilty after a trial (at which he presented no evidence). *People* v. *Zwickler* (Crim. Ct., N.Y.C., Kings Co., Feb. 10, 1965, unreported). The judgment of conviction was "unanimously reversed on the facts" by the Appellate Term upon the failure of the People "to establish that defendant distributed anonymous literature 'in quantity' ". *People* v. *Zwickler* (Sup. Ct., App. T., Kings Co., April 23, 1965, unreported). The New York Court of Appeals affirmed, without opinion, the reversal of the judg-

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* New York Penal Law § 781-b is set forth at pp. 2-3 of the Statement as to Jurisdiction.

ment of conviction. *People* v. *Zwickler* 16 N. Y. 2d 1069, 266 N.Y.S. 2d 140 (1965).

The amended complaint does not challenge the appellee with any act of bad faith. On the contrary, it alleges that appellee "is a diligent and conscientious public officer and pursuant to his duties intends or will again prosecute the plaintiff for his acts of distribution . . ." (Amend. Compl., par. 18). However, the amended complaint fails to set forth any facts which would support the claim that appellee presently "intends" to prosecute plaintiff for any acts of distribution.

In invoking the principle of abstention, a majority of the statutory Court found that none of the special circumstances which were present in *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965), were applicable here (Statement as to Jurisdiction, Appendix B). Both Judges Zavatt and Kaufman noted that the prosecution in the instant case was not being charged with bad faith; that prior New York decisions with regard to the challenged statute indicate appellant's opportunity to vindicate his alleged constitutional rights before the New York State courts; and that if appellant does not wish to assert his defenses in a criminal prosecution, he may obtain expeditious relief by instituting an action in a state court for declaratory judgment.

ARGUMENT

I

The application of the principle of abstention by the District Court, under the circumstances of this case, was manifestly a proper exercise of equitable discretion.

In abstaining from deciding the purported constitutional challenge to New York Penal Law § 781-b prior to its determination by the New York State courts, the District

Court was adhering to one of the most basic principles of federalism that has been enunciated by this Court. In speaking of the principle of abstention, this Court stated in *Harrison* v. *N.A.A.C.P.*, 360 U. S. 167, 176-177 (1959), that:

> "no principle has found more consistent or clear expression than that the federal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass upon them. See, *e.g.*, *Railroad Comm'n* v. *Pullman Co.*, [312 U. S. 496]; *Chicago* v. *Fieldcrest Dairies, Inc.*, 316 U. S. 168; *Spector Motor Service, Inc.* v. *McLaughlin*, 323 U. S. 101; *American Federation of Labor* v. *Watson*, 327 U. S. 582; *Shipman* v. *DuPre*, 339 U. S. 321; *Albertson* v. *Millard*, 345 U. S. 242; *Government & Civic Employees* v. *Windsor*, 353 U. S. 364. This principle does not, of course, involve the abdication of federal jurisdiction, but only the postponement of its exercise; it serves the policy of comity inherent in the doctrine of abstention; and it spares the federal courts of unnecessary constitutional adjudication."

The need to apply the principle of abstention, particularly with regard to attempts to enjoin the enforcement of state criminal laws, was recently restated in this Court by *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965), where the Court recognized that (pp. 484-485):

> "federal interference with a State's good-faith administration of its criminal laws is peculiarly inconsistent with our federal framework. It is generally to be assumed that state courts and prosecutors will observe constitutional limitations as expounded by this Court, and that the mere possibility of erroneous initial application of constitutional standards will usually not amount to the irreparable injury necessary to justify a disruption of orderly state proceedings."

In *Dombrowski,* the existence of special and oppressive circumstances led this Court to reject abstention since it concluded that "the defense of the State's criminal prosecution will not assure adequate vindication of constitutional rights". The allegations in the complaint in *Dombrowski,* supported by affidavits and a written offer of proof, indicated total lack of good faith on the part of the prosecution in enforcing the statutes. The record in *Dombrowski,* with its history of prosecution raids at gunpoint in the offices and homes of civil rights organization members, the seizure of files and books, and the continued prosecution of appellants after motions to suppress the seized evidence were granted for lack of probable cause, all showed that criminal processes were not being invoked with any hope of ultimate success, but only to discourage appellants' civil rights activities. The continued harassment of the appellant organization in *Dombrowski* had frightened off potential members and contributors with the result that such organization was faced with extinction if required to defend all the threatened state prosecutions. Moreover, appellants were not only indicted under overly broad and vague statutes inhibiting free expression, but were threatened with future prosecution under other statutory provisions of the Louisiana Subversive Activities and Communist Control Law and the Communist Propaganda Control Law. Under those circumstances, this Court found that even with a series of state criminal prosecutions, there was no certain or immediate prospect that appellants would be provided with a satisfactory resolution of the constitutional issues in the state courts.

In bringing this appeal, appellant attempts to rely principally upon the *Dombrowski* decision, but without showing that any of the "special circumstances" which led to the rejection of abstention in *Dombrowski* applies to the instant case. In fact, no similarity between the circumstances in *Dombrowski* and the instant complaint can be drawn.

Here, there is no allegation that the prosecution has acted in bad faith or has even threatened appellant with prosecution. On the contrary, appellee is described in the complaint as a "diligent and conscientious public officer" (par. 18) and only because of this "diligence" does appellant believe he would be prosecuted if he violated Penal Law § 781-b.

Unlike *Dombrowski,* there is no basis for inferring in this case that appellant will not be able to adequately vindicate his constitutional rights in the state courts if New York's criminal processes are invoked. Indeed, a lower New York state court has already held the challenged statute (prior to its 1962 amendment) to be unconstitutional for vagueness, *People* v. *Clampitt,* 34 Misc. 2d 766, 222 N.Y.S. 2d 33 (Spec. Sess., N. Y. Co., 1961), and appellant's conviction in 1964 was reversed in *People* v. *Zwickler, supra,* for failure of proof that he had distributed anonymous political literature in quantity.

If appellant does not wish to wait for a criminal prosecution to assert his challenge to the constitutionality of § 781-b, he may institute an action for declaratory judgment in the state court under N. Y. CPLR § 3001.* As the State Appellate Division said in *DeVeau* v. *Braisted,* 5 A. D. 2d 603, 607 (2d Dept., 1958), *aff'd* 5 N. Y. 2d 236, *aff'd* 363 U. S. 144 (1960), in upholding the use of declaratory judgment to test the validity of a penal statute:

> "One of the very purposes of a declaratory judgment is to settle a serious question of law as to the validity of a statute which would be the basis of a threatened prosecution for crime, without requiring, as a pre-

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* N. Y. CPLR § 3001 provides:

"The Supreme Court may render a declaratory judgment having the effect of a final judgment to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or can be claimed. If the court declines to render such a judgment it shall state its grounds."

requisite to judicial entertainment of the question, that interested parties first commit the very acts which are involved in the dispute and thereby run the risk of such prosecution . . ."

See, also, *New York Foreign Trade Zone Operators, Inc.* v. *State Liquor Authority,* 285 N. Y. 272 (1941); *Bunis* v. *Conway,* 17 A. D. 2d 207 (4th Dept., 1962), app. dism. 12 N. Y. 2d 882; *Bookcase Inc.* v. *Broderick,* 49 Misc. 2d 351, 267 N. Y. 2d 410 (Sup. Ct. N. Y. Co., 1965). It should be noted that the latter two cases both sustained the use of declaratory judgment to test the constitutionality of penal statutes that were attacked as infringing on First Amendment rights. It is particularly surprising that appellant's counsel in the instant case did not first resort to an action for declaratory judgment in the state court since he had successfully argued that such remedy was the most appropriate way of testing the validity of a censorship statute when serving as counsel for the plaintiff in the *Bookcase* action, *supra.*

Finally, in contrast to the situation in *Dombrowski* where appellants were faced with the ordeal of having to defend a series of criminal prosecutions under different and hopelessly vague statutory provisions with no hope for an immediate and certain resolution of the constitutional issues raised, appellant here, has singled out one section of law which can be decided immediately—assuming the proper jural relationship has been established—in a declaratory judgment action in the state court.

Appellant has interpreted the *Dombrowski* decision to require a federal district court, to discard the principle of abstention whenever a First Amendment question is raised, regardless of any showing of special circumstances and despite the availability of expeditious relief in the state courts. No opinion of this Court lends support to appellant's theory which would scrap a basic principle of federalism by the mere insertion of a few words of

pleading in the complaint. Under the circumstances of this case, there can be no question that the District Court acted correctly in applying the principle of abstention.

II

The amended complaint presents an issue of a hypothetical and abstract nature rather than a justiciable controversy which could serve as a basis for declaratory judgment in the federal courts.

It is fundamental that federal courts may only adjudicate actual controversies and will not issue advisory opinions or decide abstract, hypothetical or contingent questions. *Government and Civic Employees Organizing Committee, C.I.O.* v. *Windsor,* 353 U. S. 364, 366 (1957); *United Public Workers* v. *Mitchell,* 330 U. S. 75, 89-90 (1947); *Alabama State Federation of Labor* v. *McAdory,* 325 U. S. 450, 461 (1945). To avoid the adjudication of hypothetical issues, this Court has insisted that constitutional questions be presented in concrete rather than abstract form and only at the insistence of one who can show that he is immediately threatened with harm by the challenged action. *Poe* v. *Ullman,* 367 U. S. 497, 503-505 (1961); *Government and Civic Employees Organizing Committee, C.I.O.* v. *Windsor, supra; Rescue Army* v. *Municipal Court,* 331 U. S. 549, 575, 584 (1947).

An examination of the amended complaint can serve only to illustrate the abstract, hypothetical nature of appellant's case. There is no allegation that appellant has taken any action to distribute anonymous political literature in violation of the statute he attacks.* Instead, there is only

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* Since the political literature appellant intended to distribute all related to the 1966 congressional candidacy of Abraham Multer (Statement as to Jurisdiction, App. pp. 27-28), this matter now might be properly dismissed for mootness. Cf. *Lomenzo* v. *WMCA, Inc.,* 384 U. S. 887 (1966).

a statement of intention that appellant desires to distribute such literature. There is no allegation that appellee has taken any step to prosecute appellant. Instead, there is only the speculative charge that since appellee is a "diligent and conscientious public officer", he would prosecute appellant if he distributed anonymous political literature in the future. Of course, the actual facts and circumstances which would serve as the basis for a future indictment could not possibly be spelled out in the complaint.

Thus, while the propriety of the action of the Court below in abstaining cannot seriously be questioned, that Court might also have dismissed the amended complaint for failing to present a justiciable controversy in clear and concrete form warranting an action for declaratory judgment in a federal court.

CONCLUSION

For the foregoing reasons, the appeal should be dismissed, or, in the alternative, the order of the three-judge court of September 29, 1966 should be affirmed.

Dated: New York, New York, December 19, 1966.

Respectfully submitted,

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